IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KRISTEN SALGADO and JULIAN SALGADO	:	CIVIL ACTION
v.	:	
FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for PULASKI SAVINGS BANK	:	NO. 02-8734

O'NEILL, J. NOVEMBER 15, 2004

MEMORANDUM

Plaintiff's complaint contains four counts against Pulaski Savings. Count I alleges violations of the Fair Credit Report Act ("FCRA"). Count II alleges defamation. Count III makes a claim for tortious interference with contractual relations. Count IV alleges negligence. The FDIC has been substituted as defendant because it is the receiver for Pulaski Savings.

I have before me defendant's motion for summary judgment, plaintiffs' opposition thereto, and supplemental memoranda by each party.

BACKGROUND

Plaintiffs' home was purchased with a loan from Pulaski Savings Bank secured by a mortgage on the home. One of the loan documents that plaintiffs signed gave Pulaski authority to report any delinquency in plaintiffs' loan to credit reporting agencies.

In March 2001 Kristen Salgado called Pulaski Savings Bank and told the Bank's representative that plaintiffs would not be able to make their June 2001 mortgage payment. Mrs. Salgado says that she "requested, verbally, if we could 'miss/skip' June's payment, [and that] she [Pulaski's representative] told us that it shouldn't be a problem and reversed our automatic

withdrawal for June's payment."

Plaintiffs made their regularly scheduled mortgage payments beginning again in July 2001. They paid the June 2001 payment in November 2001. Pulaski Savings treated the late payment as a delinquency in plaintiffs' account and reported it to credit reporting agencies. Plaintiffs allege that they have suffered financially because of the negative report on their credit history.

Plaintiffs' loan with Pulaski Savings was paid in full at the end of 2001. They filed the complaint on November 27, 2002. In November 2003 the Pennsylvania Secretary of Banking closed Pulaski Savings and appointed the FDIC as receiver for the bank.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court has recognized that the moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party, to prevail, must make a showing sufficient to establish the existence of every element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The nonmoving party may not simply rest upon the allegations or

denials of the party's pleading. See id. at 324.

I must determine whether any genuine issue of material fact exists. An issue is "material" only if the factual dispute "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the record taken as a whole in a light most favorable to the nonmoving party "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

DISCUSSION

Defendant moves for summary judgment on the basis of the federal common law and statutes that protect the FDIC against undocumented agreements between a bank and third parties. The protection was first announced in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). Congress later passed two statutes to protect the FDIC: 12 U.S.C. § 1823(e) and 12 U.S.C. § 1821(d)(9)(A).

In D'Oench, the Supreme Court held that a debtor to a bank may not raise any unwritten agreements with the bank in defense of collection by the receiver of the bank. D'Oench, 315 U.S. at 462. The Court announced a "federal policy" designed to "protect [the FDIC] . . . and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] . . . insures or to which it makes loans." Id. at 457. The Court of Appeals for the Third Circuit has held that D'Oench is no longer applicable and looks only to the statutory law. FDIC v. Deglau, 207 F.3d 153, 171 (3d Cir. 2000).

The statutory protections for the FDIC were passed as part of the Financial Institution Reform, Recovery and Enforcement Act. The pertinent part of section 1823(e), titled Agreements Against Interests of Corporation, currently reads:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [12 U.S.C. § 1821], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--
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> (A) is in writing,
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> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
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> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
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> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

Section 1821(d)(9)(A) states "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver of the Corporation."

The FDIC argues that section 1821(d)(9)(A) protects it from this suit because plaintiffs' case is based upon the alleged agreement by Pulaski Savings' representative that plaintiffs could "miss/skip" their June 2001 mortgage payment, an agreement that clearly does not meet section 1823(e)'s requirement that it be in writing. Plaintiffs reply that section 1821(d)(9)(A) does not apply to this case because the agreement at issue is not an "agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it."

I hold that section 1821(d)(9)(A) incorporates the requirement in section 1823(e) that the agreement at issue be tied to a specific, identifiable asset acquired by the FDIC. Thigpen v. Sparks, 983 F.2d 644, 648-49 (6th Cir. 1993); Condus v. Howard Savings Bank, 1996 U.S. Dist.

LEXIS 21991, at *18 (D.N.J. 1996); McGarry v. Resolution Trust Corp., 909 F. Supp. 241, 248 (D.N.J. 1995); In re NBW Commercial Paper Litig., 826 F. Supp. 1448, 1465 (D.D.C. 1992). But see Fox & Lazo-Atlantic v. Resolution Trust Corp., 862 F. Supp. 1233, 1242 (D.N.J. 1994). It makes more sense to read section 1821(d)(9)(A) as referring to only the "agreements" defined by section 1823(e) because to do otherwise, as the Sixth Circuit has held, would lead to ridiculous results. Thigpen, 983 F.2d at 649. If section 1821(d)(9)(A) protected the FDIC from any agreement that did not meet the section 1823(e) requirement, then any creditor of the bank would have to meet the stringent requirements of 1823(e) to be paid. As the Sixth Circuit has said that interpretation would "transform § 1821(d)(9)(A) from a provision protecting the failed bank's loan portfolio from D'Oench-like secret agreements into a meat-axe for avoiding debts incurred in the ordinary course of business." Thigpen, 983 F.2d at 649; see also McGarry, 909 F. Supp. at 247. There is no indication in the language of the statute or the legislative history to show that Congress intended such a result.

The FDIC did not acquire a specific, identifiable asset to which this action relates. The plaintiffs' loan was paid in full before the FDIC was appointed as receiver for Pulaski Savings. Therefore, section 1821(d)(9)(A) does not bar plaintiffs' claim. I will deny the FDIC's motion for summary judgment.

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ORDER

AND NOW, this 15th day of November 2004, upon consideration of defendant's motion for summary judgment, plaintiff's opposition thereto, and both parties' further replies, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendant's motion for summary judgment is DENIED.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.